

**Additional Information Related to Settlement of ACL Complaint No. R5-2005-0501
Against Hilmar Cheese Company, Inc., and Hilmar Whey Protein, Inc.**

In addition to the alleged violations detailed in the Staff Report supporting ACL Complaint No. R5-2005-0501 ("the ACL matter") against Hilmar Cheese Company, Inc., and Hilmar Whey Protein, Inc. (hereinafter collectively, "HCC"), Regional Board staff also received information relating to allegations of other types of water quality violations by HCC that were potentially criminal in nature. The Regional Board in closed session referred these alleged violations to the California Attorney General's Office for criminal investigation and, if warranted, prosecution.

The Attorney General's Office, assisted by State and Regional Board staff not involved in prosecuting the ACL matter, conducted the investigation. The investigation focused primarily on allegations of undisclosed tile drain lines beneath land used by HCC and its agents for disposal of its cheese process wastewater. None of the allegations described below regarding the criminal investigation, including statements regarding the alleged conclusions or findings of the investigators, were included in the ACL Complaint or supporting Staff Report. HCC has therefore had no opportunity to rebut these allegations of fact with testimony or evidence, vigorously disputes their accuracy and relevance to the ACL matter, and has informed Regional Board staff that it reserves the rights to raise all claims and substantive and procedural defenses of whatever kind, including those relating to the propriety and conduct of the investigation, to present evidence, to depose and cross-examine witnesses, to make arguments, orally and in writing, marshalling the evidence, and to assert any other rights it may have relating to these allegations, if this Settlement Agreement is not approved.

On 21 July 2005, the Attorney General's Office sent Regional Board Executive Officer Thomas Pinkos a letter stating: "After an extensive investigation, we are closing our criminal investigation. However, our office will likely contact your staff concerning some facts we have discovered that may merit inclusion in the present Administrative Civil Liability action." Prosecution Staff was provided with certain documents and evidence relating to those alleged facts, and has used them solely and exclusively in connection with ongoing confidential settlement discussions relating to the ACL matter. Prosecution Staff has subsequently evaluated the alleged facts, which are described generally below, and has determined it is appropriate to settle and include these allegations within the "Matters Covered" in the Settlement Agreement for the ACL matter.

The summary¹ of alleged facts set forth below are, like the matters alleged in the ACL Complaint and Staff Report, offered by Regional Board staff for the Regional Board's consideration as background for evaluating the Settlement Agreement and are allegations, not evidence. The investigation reports generated in the criminal investigation allege that there is a network of tile drains in the vicinity of HCC called the "Nyman Drain" system. The tile drains were apparently constructed in approximately 1996 by local landowners who later formed Subsurface Improvement District D-61. The Nyman Drain discharges the subsurface water that is collected

¹ This summary is of information contained in the public file for the Hilmar facility maintained in the Regional Board's Fresno office.

by the tile drains into Turlock Irrigation District ("TID") Lateral No. 6, which is tributary to the San Joaquin River. During the course of the investigation, the investigators reviewed the reports submitted to Regional Board staff by HCC and its consultants, conducted surveillance of the Nyman Drain, collected samples of subsurface drainage water for water quality analysis, and conducted interviews with contractors, consultants, and former employees of HCC. No officials or current employees of HCC were interviewed.

The investigation confirmed the existence of one tile drain line connected to the Nyman Drain system that allegedly had not been disclosed to Regional Board staff. HCC had identified the Nyman Drain to the Regional Board in its April 2000 Report of Waste Discharge ("RWD"). However, neither that submittal nor numerous other technical submittals identified the particular tile drain line referenced in the allegations. That tile drain line is located on a 76.2-acre parcel that has been used at times for the disposal of HCC's cheese process wastewater. Regional Board investigation reports allege that investigators concluded that it was likely HCC officials knew or should have known of the presence of the tile drain line. As noted above, the line was apparently undisclosed to the Regional Board. The team confirmed the presence of the drain line through as-built drawings of the Nyman Drain obtained directly from TID. The as-built drawings show a valve on the low (down gradient) end of this drain line that, if closed, could be used to prevent the subsurface drainage waters collected by the tile drain line from entering the Nyman Drain system.

During four inspections of the valve in April, May, July, and October 2004, the investigators found the valve's open/shut indicator arrow pointing to the open mark. Tile drain wastewater samples were collected at the main collection sump for the Nyman Drain in July and August 2004. The samples were from an inlet to the collection sump that corresponds to the undisclosed tile drain line. The samples were analyzed, and the results indicated good quality water, with an Electrical Conductivity (EC) of 560 $\mu\text{mhos/cm}$ and 580 $\mu\text{mhos/cm}$, respectively.

During May and August 2005 site inspections, the valve was partially disassembled (i.e., some bolts had been removed), and the valve had been badly damaged (e.g., run over by a piece of heavy machinery). Photos taken during these later investigations indicate that the open/shut indicator arrow was pointing to the closed mark on those dates.

Around March 2001, at the request of Regional Board staff, HCC had installed a manhole and began sampling a tile drain line from the only parcel (19.1-acre) known by Regional Board staff at the time to both be receiving cheese process wastewater and having underlying tile drains. Tile drain samples collected from the manhole indicated high levels of cheese waste constituents; however, no flow was ever recorded by a flow meter installed at the manhole. In March 2002, staff questioned the appropriateness of the flow meter system based on the type of probe used and given the apparent inconsistency of a tile drain line with no flow but one in which water samples could be collected and water levels rose and fell. An 18 July 2003 Regional Board letter points out that the flow meter installed to monitor tile drainage was not operating effectively. The letter requested that HCC investigate the situation and either fix the meter or replace it with one that would operate effectively. HCC decided instead to plug the line. As of January 2003, it appears that the line was effectively plugged.

Another allegation concerned a 725-foot section of tile drain line installed on a 19.7-acre parcel used for disposal of HCC cheese process wastewater. This section was allegedly supposed to be solid pipeline, as the parcel was not part of Improvement District D-61, and was only to convey tile drain water from an adjacent property with limited access. The investigators concluded that a perforated line may have been installed instead of a solid drain line, reportedly for technical reasons (i.e., the high water table made solid plastic pipe too buoyant). The easement for this parcel indicated a solid pipe that would therefore indicate that the easement was improperly recorded with the Merced County Recorder's Office. The investigators concluded that this section of allegedly perforated line was sealed off when HCC plugged the section of tile drain monitored by the manhole in January 2003.

Other allegations that were not substantiated by direct evidence during the course of the investigation included a claim of falsification of self-monitoring reports submitted to the Regional Board in the late 1990's and concerns over some type of secret pipe system connected to the Nyman Drain that would allow a direct discharge of HCC's wastewater to a water of the United States. However, as noted above, there was insufficient evidence to support these allegations.

It was also alleged that the discharge of cheese process wastewater to land upgradient of the Nyman Drain could have affected the quality of subsurface water collected by the Nyman Drain and its discharge to TID Lateral No. 6. However, both water quality samples collected at the main collection sump during the course of the investigation indicated water quality similar to tile drains in the area with an EC of around 900 μ mhos/cm.

The criminal investigation is now over, and the Attorney General's Office has determined that it will not file criminal charges. ACL Prosecution Staff has determined that it is appropriate to include these additional alleged violations in the Matters Covered in the proposed Settlement Agreement for the settlement of ACLC No. R5-2005-0501 against HCC.